

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL SECURITY COUNSELORS
1200 South Courthouse Road, Suite 124
Arlington, VA 22204,

and

JEFFREY STEIN
4547 Grant Road, NW
Washington, DC 20016,

and

TRUTHOUT
3539 Bradshaw Road #B-166
Sacramento, CA 95827,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530,

Defendant.

Civil Action No. 1:13-cv-00556

* * * * *

COMPLAINT

Plaintiffs National Security Counselors,, Jeffrey Stein, and Truthout bring this action against Defendant Department of Justice pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, as amended (“FOIA”), the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. § 1651.

JURISDICTION

1. This Court has both subject matter jurisdiction over this action and personal jurisdiction over Defendant pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

VENUE

2. Venue is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff National Security Counselors (“NSC”) is a non-profit organization under the laws of the Commonwealth of Virginia and has the ability to disseminate information on a wide scale.

4. Plaintiff Jeffrey Stein (“Stein”) is a U.S. citizen and is a resident of the District of Columbia. Stein is a representative of the news media within the meaning of 5 U.S.C. § 552(a)(4)(A).

5. Plaintiff Truthout is a non-profit organization under the laws of the state of California. Truthout is a representative of the news media within the meaning of 5 U.S.C. § 552(a)(4)(A).

6. Defendant Department of Justice (“DOJ”) is an agency within the meaning of 5 U.S.C. § 552(e), and is in possession and/or control of the records requested by Plaintiffs which are the subject of this action.

7. The Civil Division (“Civil”), Federal Bureau of Investigation (“FBI”), and Office of Information Policy (“OIP”) are DOJ components.

8. Because all counts herein pertain to FBI or Civil, those components will be treated as the “Defendants” to avoid confusion, even though DOJ is legally the proper party defendant.

FIRST CAUSE OF ACTION

(NSC – FBI – FEE WAIVER DENIAL – 1148707-002)

9. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

10. In 2010 the FBI FOIA Electronic Reading Room read, in pertinent part, “Manual of Administrative Operations and Procedures (MAOP) -- 1,886 pages (Electronic copy of the record can be sent in CDRom form after a quick submission of electronic form or a FOIA request by mail.)”

11. On 19 May 2010 NSC submitted to FBI a FOIA request for an electronic copy of the MAOP using the electronic form. NSC requested a public interest fee waiver.

12. On 27 May 2010 FBI acknowledged receipt of this request and assigned it Request No. 1148707-000. FBI denied NSC’s request for a public interest fee waiver and informed NSC that it would be sent a CD containing the MAOP upon payment of a \$15 fee.

13. On 3 June 2010 NSC Executive Director Kel McClanahan called FBI FOIA Public Liaison Dennis Argall (“Argall”) to complain about the denial of NSC’s request for a public interest fee waiver, arguing that the MAOP should already be made publicly available pursuant to 5 U.S.C. § 552(a)(2). Argall granted NSC’s request for a fee waiver and indicated that a CD would be forthcoming.

14. On 11 June 2010 FBI released an electronic copy of the MAOP to NSC on a single CD. The electronic copy was a poorly scanned version of the 1998 edition.

15. On 16 June 2010 NSC emailed David Sobonya (“Sobonya”), the FBI Public Information Officer, asking if the version released was the most current edition and/or the best quality version, emphasizing that NSC sought a copy of the current edition.

16. On 17 June 2010 Sobonya was advised by another FBI source that the January 2007 edition of the MAOP had been previously processed under FOIA for Request No. 1049564-000 but was not available in the Electronic Reading Room.

17. On 17 June 2010 FBI released an electronic copy of the January 2007 edition of the MAOP to NSC on a single CD. The electronic copy did not have a Table of Contents.

18. On 22 June 2010 NSC emailed Sobonya, asking if the January 2007 edition was the most current edition, and asking for a Table of Contents.

19. On 23 June 2010 Sobonya was advised by another FBI source that: a) no Table of Contents was processed for Request No. 1049564-000; b) NSC would have to submit a new FOIA request for the Table of Contents; c) the most current edition was March 2008; and d) NSC would have to submit a new FOIA request for the March 2008 edition.

20. On 23 June 2010 Sobonya emailed NSC, informing it that he “believe[d] some revisions were made in 2008” and that NSC would have to submit a new FOIA request for either the Table of Contents or the most current edition.

21. On 23 June 2010 NSC emailed Sobonya, emphasizing that the original request had been for the full, current version of the MAOP and insisting that FBI stop sending only previously processed versions. After receiving no response from FBI, NSC re-sent the 23 June 2010 email on 23 July 2010, with a copy to Argall.

22. On 26 July 2010 Argall emailed NSC, stating that FBI would reprocess the request for the entire MAOP or just the Table of Contents, depending on NSC’s wishes. NSC replied that it wanted whatever records were necessary to allow it to construct a current edition.

23. On 8 February 2011 FBI reassigned this request Request No. 1148707-001 and released a paper copy of the Table of Contents of the current MAOP to NSC, stating, “This completes the processing of your FOIA request by the FBI.”

24. On 11 February 2011 NSC emailed Argall, reemphasizing that the request was for the a) full b) current c) MAOP. On 15 February 2011 NSC added that the request was specifically for an electronic record and asked Argall to send an electronic file of the Table of Contents immediately and an electronic file of the remainder of the document when it was ready for release.

25. On 18 February 2011 FBI reassigned this request Request No. 1148707-002 and stated that it had denied NSC’s request for a public interest fee waiver.

26. On 24 February 2011 NSC emailed Argall, pointing out that he had approved NSC’s request for a fee waiver in June 2010.

27. On 25 February 2011 Argall emailed NSC, stating that NSC had never been granted a fee waiver and that NSC would have to file an administrative appeal of FBI’s denial.

28. On 5 October 2011 NSC appealed this determination to OIP (with permission to file a late appeal). OIP acknowledged this appeal on 9 December 2011 and assigned it Appeal No. AP-2012-00784.

29. On 23 May 2012 OIP affirmed FBI’s denial of NSC’s request for a public interest fee waiver.

30. NSC has a legal right under FOIA to receive the fee waiver which was already granted, and there is no legal basis for the denial by FBI of said right.

SECOND CAUSE OF ACTION

(NSC – FBI – FAILURE TO PUBLISH)

31. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

32. FOIA requires agencies to proactively publish several types of records.

33. Agencies are required to proactively publish “administrative staff manuals and instructions to staff that affect a member of the public.” 5 U.S.C. § 552(a)(2)(C).

34. Agencies are required to proactively publish “copies of all records, regardless of form or format, which have been released to any person [in response to a FOIA request] and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.” *Id.* § 552(a)(2)(D).

35. The MAOP is an administrative staff manual that affects members of the public.

36. The MAOP is also a frequently requested FBI record which is likely to continue to be requested.

37. FBI has published a copy of the 2007 edition of the MAOP in its FOIA Electronic Reading Room.

38. FBI is required by FOIA to proactively publish the most current edition of the MAOP.

39. The proper judicial relief for a violation of 5 U.S.C. § 552(a)(2) is an order directing the agency to release a copy of the record which should have been published to the litigant who brought the challenge. *Kennecott Utah Copper Corp. v. Dep’t of the Interior*, 88 F.3d 1191, 1202-03 (D.C. Cir. 1991).

40. Accordingly, NSC has a legal right under FOIA to receive an electronic copy of the current edition of the MAOP free of charge.¹

THIRD CAUSE OF ACTION

**(NSC, STEIN, TRUTHOUT – FBI – EXCESSIVE FEES – 1148707-002, 1173246-000,
1197184-000)**

41. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

Request No. 1148707-002

42. On 24 February 2011 FBI informed NSC that it had located approximately 2038 pages of material responsive to Request No. 1148707-002.² FBI informed NSC that it would only place approximately 500 pages on a single CD, requiring NSC to pay for five CDs. FBI stated, “The 500 page estimate is based on our business practice of processing medium and large track cases through interim releases that generally equal approximately 500 pages.”

43. In response NSC informed FBI that it waived its right to interim responses and wanted all pages on a single CD.

44. On 5 October 2011 NSC appealed the FBI’s practice of only placing approximately 500 pages on a CD to OIP as part of Appeal No. AP-2012-00784.

45. On 23 May 2012 OIP affirmed FBI’s 500-page practice.

¹ Counts 1 and 2 present alternative theories of recovery for the same requested relief, namely, ordering FBI to release a copy of the current edition of the MAOP to NSC (after redacting any exempt information) free of charge.

² Presumably the current edition of the MAOP is 2038 pages long.

Request No. 1173246-000

46. On 13 September 2011 Stein submitted to FBI a FOIA request for all pages on the internal FBI Records Management Division (“RMD”) website <http://rmd.fbinet.fbi>, as well as all documents, images, audio and video files, and any other files posted on the RMD website. Stein also requested a public interest fee waiver.

47. This request stated:

Please provide any records produced in response to this request in the *original* electronic (soft-copy) forms in which they are posted on the RMD website (e.g., word processing documents should remain word processing documents, spreadsheets should remain spreadsheets, image files should remain image files, etc.). The only exception to this rule is that actual webpages may be converted to Adobe Acrobat files. Please provide soft-copy records by email or on a CD if email is not feasible. If a CD is necessary, Mr. Stein specifically absolves the FBI of its responsibility to make interim releases and directs the FBI to provide *all* responsive records on *one CD* at the end of its processing of this request unless all the records will not physically fit on one CD.

48. On 15 September 2011 FBI acknowledged receipt of this request and assigned it Request No. 1173246-000.

49. On 27 September 2012 FBI released 567 pages of responsive material to Stein and withheld twelve pages. FBI informed Stein that it had identified approximately 21753 additional pages and that it would only place approximately 500 pages on a single CD, requiring Stein to pay for forty-four CDs. FBI also denied Stein’s request for a public interest fee waiver without giving any reasons.

50. Stein did not appeal this determination to OIP, since OIP had upheld FBI's 500-page practice multiple times before and had never to his knowledge reversed it. An appeal of FBI's determination would have been futile.

Request No. 1197184-000

51. On 22 May 2012 Truthout submitted to FBI a FOIA request for records about the Campus Liaison Initiative. Truthout agreed to pay up to \$500 in processing fees.

52. On 17 August 2012 FBI acknowledged receipt of this request and assigned it Request No. 1197184-000. FBI informed Truthout that it had located approximately 26000 pages of responsive material. FBI informed Truthout that it would only place approximately 500 pages on a single CD, requiring Truthout to commit to pay \$765 for fifty-two CDs.

53. On 7 September 2012 Truthout appealed this determination to OIP, adding, "Truthout specifically absolves the FBI of its responsibility to make interim releases and directs the FBI to fill each CD to capacity and charge Truthout accordingly for the actual number of CDs used. This means that the FBI may *not* arbitrarily limit each CD to approximately 500 pages." OIP acknowledged this appeal on 26 September 2012 and assigned it Appeal No. AP-2012-03398.

54. Truthout also informed both FBI and OIP, "So that the FBI can continue to process this request while you consider this appeal, Truthout does commit to paying the \$765 duplication fee if you affirm the FBI's initial determination. However, Truthout reserves the right to seek judicial review of an unfavorable appeal decision on this matter, with the intent of reducing the fees to account for the proper number of CDs the FBI *should have* used."

55. On 12 March 2013 OIP informed Truthout that it had closed this appeal because Plaintiffs had filed the case *Shapiro v. DOJ*, No. 12-1883 (D.D.C.).³

56. Unless the files are uncommonly large, a standard CD can hold thousands of pages of electronic records.

57. FBI's rationale for limiting the number of pages on a single CD is twofold. First, it will allegedly facilitate review of bulky documents by numerous analysts. Second, it will allegedly allow for rolling interim releases to be made.

58. The CDs used by FBI are non-rewritable media. Therefore, information can only be written to them once and cannot then be edited. This means that FBI analysts can only save information to CDs *after* they have finished processing it for release. Accordingly, the number of CDs created *after* analysts have completed processing the records bears no relation to the ability of the analysts to review and process the records.

59. NSC, Stein, and Truthout have all specifically requested that no interim releases be made. Accordingly, FBI has no reason to insist on multiple CDs for the purposes of making interim releases.

60. DOJ has admitted that this is an FBI policy. NSC has received multiple letters from FBI and OIP defending this policy.

61. A policy of artificially limiting the number of pages that can be stored on a CD, while charging requesters a "per CD" fee, is a violation of FOIA. Such a practice constitutes outrageous conduct for purposes of the broad equitable powers provided by FOIA to the Court. Such a policy is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

³ On 17 April 2013 Judge Howell ordered all counts but one to be severed from the complaint in *Shapiro* and refiled in different cases. All counts in this Complaint except for Count 2 were

62. As frequent FOIA requesters to FBI for large volumes of electronic records who will continue making such requests, NSC, Stein, and Truthout stand to continue to be harmed by this ongoing practice in the future.

63. No Plaintiffs have requested the same exact records, but they have all requested that electronic records be released on the minimum possible number of CDs and had those requests denied on the basis of the same blanket policy, in which the nature of the requested records has no relation to the agency's determination.

64. Plaintiffs currently have several FOIA requests pending with FBI which are vulnerable to this policy but are not included in this litigation. The requests included herein are simply examples of the requests already filed by Plaintiffs, and Plaintiffs continue to file requests for FBI records, waive their rights to interim releases, and ask to have the records released on the minimum number of CDs. As long as this policy is in effect, Plaintiffs will be required to pay more for these releases than FOIA authorizes, which will force them to choose between spending additional money or not receiving the records they seek.

65. NSC, Stein, and Truthout are therefore entitled to relief in the form of a declaratory order that FBI is in violation of its statutory responsibilities under FOIA and an injunction compelling FBI pursuant to that statute to place as many pages as possible on a single CD if a requester gives informed consent waiving his right to interim releases.

66. Alternatively, NSC, Stein, and Truthout are entitled to relief in the form of an order enjoining FBI from charging requesters for multiple CDs if it elects to provide multiple CDs after receiving such informed consent.

among the severed counts.

67. NSC, Stein, and Truthout are also entitled to receive the records responsive to Request Nos. 1148707-002, 1173246-000,⁴ and 1197184-000 on the smallest possible number of CDs.

FOURTH CAUSE OF ACTION

(NSC – CIVIL – FEE WAIVER DENIAL – 145-FOI-10718, 145-FOI-10719)

68. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

Request No. 145-FOI-10718

69. On 19 September 2011 NSC submitted to Civil a FOIA request for a list of all FOIA cases handled by the Federal Programs Branch (“FPB”) between 2000 and the present. NSC also stipulated that should it be difficult to generate such a list, it would alternatively accept all Notices of Appearance filed by FPB attorneys in FOIA cases for the relevant time period. NSC requested a public interest fee waiver.

⁴ Stein concedes that his failure to file an administrative appeal regarding Request No. 1173246-000 would normally constitute a failure to exhaust administrative remedies for that request. Given that failure to exhaust administrative remedies is a jurisprudential rather than jurisdictional consideration in this Circuit, Stein respectfully suggests that judicial and agency resources would be conserved by considering Request No. 1173246-000 to be properly subject to this litigation, since the only question actually before the Court is the legitimacy of FBI’s 500-page policy, and the only request-specific relief being sought is limited solely to, “If the Court holds that this practice violates FOIA, please apply that holding to this specific request.” *See Jones v. BOP*, No. 03-1647, slip op. at 3 (D.D.C. May 18, 2004) (allowing plaintiff to maintain unexhausted claim that was “substantially similar” to exhausted claim, because reaching its merits would not undermine purposes of administrative review), *summary affirmance granted*, No. 04-5498 (D.C. Cir. Jan. 20, 2006). Given the multiple times that OIP has affirmed this practice on appeal, it is highly unlikely that an administrative appeal of its application to this specific request would result in a change of position, and any administrative appeal submitted by Stein would be futile.

70. On 17 October 2011 Civil acknowledged receipt of this request and assigned it Request No. 145-FOI-10718. Civil denied NSC's request for a public interest fee waiver, stating that the requested records were publicly available.

71. On 2 December 2011 NSC appealed this determination to OIP. OIP acknowledged this appeal on 9 December 2011 and assigned it Appeal No. AP-2012-00782.

72. On 22 May 2012 OIP affirmed Civil's denial of NSC's request for a public interest fee waiver.

Request No. 145-FOI-10719

73. On 19 September 2011 NSC submitted to Civil a FOIA request for sworn declarations made by agency representatives as part of specified FOIA or Privacy Act cases. NSC requested a public interest fee waiver.

74. On 17 October 2011 Civil acknowledged receipt of this request and assigned it Request No. 145-FOI-10719. Civil denied NSC's request for a public interest fee waiver, stating that the requested records were publicly available.

75. On 2 December 2011 NSC appealed this determination to OIP. OIP acknowledged this appeal on 9 December 2011 and assigned it Appeal No. AP-2012-00783.

76. On 22 May 2012 OIP affirmed Civil's denial of NSC's request for a public interest fee waiver.

77. Civil's initial rationale for determining that the requested records in both requests are publicly available appeared at first to be the fact that they are on the public record in courthouses across the country and, in some cases, electronically available for a fee through the Public Access to Court Electronic Records ("PACER") system.

78. OIP stated in both appeal denial letters that this apparent rationale was *not* the rationale for either denial. OIP stated that its determination that the requested records in both requests are publicly available was solely based on the fact that NSC could obtain them by filing a FOIA request with Civil and paying a fee.⁵

79. OIP's stated rationale reflects a fundamental misapplication of the "publicly available records" exception to fee waivers. According to OIP, *all* releasable agency records are "publicly available" because they all can be obtained for a fee. No requester requesting non-exempt records would ever be granted a fee waiver under OIP's reading.

80. NSC has a legal right under FOIA to receive a public interest fee waiver for both of these requests, and there is no legal basis for the denial by DOJ of said right.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs National Security Counselors, Jeffrey Stein, and Truthout pray that this Court:

(1) Declare and find that the Federal Bureau of Investigation violated FOIA by refusing to store more than approximately 500 pages on a single CD, and that this violation was intentional and/or willful;

(2) Declare and find that any DOJ regulations, guidelines, or policy statements that authorize arbitrarily restricting the number of pages of electronic records stored on a CD constitute an unreasonable interpretation of the statutory obligations imposed by FOIA;

⁵ Accordingly, DOJ is precluded from making the argument that the requested records are publicly available because they are available in court records. *See Friends of the Coast Fork v. Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997) ("The agency must stand on whatever reasons for denial it gave in the administrative proceeding. If those reasons are inadequate, and if the requesters meet their burden then a full fee waiver is in order.")

(3) Order FBI, in the form of injunctive relief, to place as many pages as possible on a single CD if a requester gives informed consent waiving his right to interim releases and to amend its regulations, guidelines, and policy statements accordingly;

(4) Declare and find that FBI is required by FOIA to publish the current edition of the MAOP;

(5) Order DOJ to disclose the requested records in their entirety and make copies promptly available to Plaintiffs in electronic format when so requested;

(6) Order DOJ to grant NSC's requests for public interest fee waivers;

(7) Order preliminary and permanent injunctive and/or declaratory relief as may be appropriate;

(8) Award reasonable costs and attorneys' fees as provided in 5 U.S.C. § 552(a)(4)(E), 28 U.S.C. § 2412(d), or any other applicable law;

(9) Expedite this action in every way pursuant to 28 U.S.C. § 1657(a); and

(10) Grant such other relief as the Court may deem just and proper.

Date: April 24, 2013

Respectfully submitted,

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